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No. 86-330

In the Supreme Court of the United States

OCTOBER TERM, 1986

DENNIS J. LE BEAU, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Merit Systems Protection Board's determination that petitioner was properly removed from federal employment on the grounds that he participated in a strike against the United States and was absent from his duty post without leave.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 795 F.2d 1015 (Table). The opinion of the Merit Systems Protection Board (Pet. App. 2a-6a) is reported at 17 M.S.P.R. 160. The Board's initial decision (Pet. App. 7a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1986. The petition for a writ of certiorari was filed on July 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a former air traffic controller, challenges his removal from federal employment following the air traffic controllers' strike in 1981. The background of the strike and

the course of the subsequent litigation are set forth in our brief in opposition in *Campbell* v. *Department of Transportation*, cert. denied, 469 U.S. 881 (1984), one of a number of other cases arising out of the strike.[1]

1. The Federal Aviation Administration (FAA) removed petitioner from his position as an air traffic controller on the grounds that he participated in a strike against the United States and was absent without leave during the strike. Petitioner sought review of that action before the Merit Systems Protection Board. Following a hearing, the presiding official issued an initial decision upholding petitioner's removal (Pet. App. 7a-14a). The presiding official first concluded that a prima facie case against petitioner had been established by evidence demonstrating that petitioner was absent without leave during a strike of general knowledge (*id.* at 8a).[2] Petitioner attempted to rebut this showing by introducing evidence that his participation in the strike was involuntary because it was the result of coercion by strike supporters (*id.* at 9a-12a).

Petitioner submitted evidence showing that "on three occasions in 1981, prior to the strike, [his] home and automobile were vandalized after [union] meetings at which [petitioner] voiced his opposition to going out on strike"

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[1]A copy of our brief in *Campbell* has been sent to counsel for petitioner.

[2]The Federal Circuit has held that the FAA at all times bears the burden of establishing strike participation; it must show by a preponderance of the evidence that the employee withheld his services in concert with others. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477, 482 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984). Once the agency makes a prima facie showing of strike participation by presenting evidence of the employee's unauthorized absence during a strike of general knowledge, "the burden of going forward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing" (*ibid.*).

(Pet. App. 9a). Eggs were thrown at petitioner's home and obscenities were sprayed on his home and car with shaving cream. Petitioner testified that he also was subjected to harassment while he was at work. He stated that "[o]n one occasion * * * following a PATCO meeting, [he] discovered the handle had been broken off his lunch box and his lunch box stuffed with garbage" (*id.* at 10a). In addition, "militant [union] members gave [petitioner] the cold shoulder treatment or verbally abused him by calling him a 'scab' or other obscenities. * * * [Union] supporters ensured that [petitioner] had the least desirable duties and generally refused to relieve him unless ordered to do so by a supervisor" (*ibid.*).

The presiding official recounted (Pet. App. 11a) petitioner's testimony regarding threats by union supporters:

> [w]hile eating his lunch next to some PATCO members in the facility's lunchroom in April of 1981, [petitioner] claims he heard them discussing damaging cars and painting scabs' houses. [Petitioner] also heard them state that "it would be a good idea" to bring in goons to break some legs to prevent people from crossing picket lines, and further, that it would be easy to order a truck load of rocks to dump on a scab's lawn.

Petitioner also was told that a union "militant" had stated that he "would personally stop anybody from going to work," although there is no evidence that this individual ever directly threatened petitioner (*ibid.*). When petitioner told the union activist that he did not want to go to a union meeting, the activist responded that if petitioner did not attend "he 'would make sure that [petitioner] didn't go down the stairs the next day and he would personally put [petitioner] in the hospital' " (*ibid.*).

The presiding official concluded that petitioner failed to show that his decision to stay away from his job during the strike "was based upon a reasonable fear of physical danger

to himself or others" (Pet. App. 12a). She found "no direct threat of physical danger to [petitioner] if he attempted to report to work during the strike," noting that the threats of violence were "general in nature and directed at no one person in particular" (*ibid.*).[3] She also observed that petitioner "never attempted to report for work from August 3 through August 6, 1981, and never made an attempt to call anyone at the facility until August 7, 1981. He therefore had no knowledge of the situation at the facility regarding picketers" (*ibid.*). The evidence showed that "there was no violence on the picket line" and that petitioner's fear of crossing the picket line therefore was not reasonable (*id.* at 13a).[4]

The Merit Systems Protection Board affirmed the initial decision (Pet. App. 4a-6a). It stated that the facts did not merit a finding of coercion under the relevant standard.[5] The Board noted that petitioner's argument was based upon evidence of threats made by union members, and observed that petitioner "does not claim that any threats were directed at him, and, as noted by the presiding official, had [petitioner] attempted to discern the atmosphere at the facility during the strike, he would have found that no one was physically harmed or prevented from crossing the picket line" (*id.* at 5a).

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[3]The presiding official found that the damage to petitioner's house and car was "superficial in character, easily remedied, with little significant permanent damage" and that "fear of damage to one's property" does not justify strike participation (Pet. App. 12a).

[4]The presiding official noted that petitioner presented testimony that one controller "refused to cross the picket line after receiving 'a lot of verbal abuse' and being spit upon," but concluded that these facts were "insufficient to establish a reasonable fear of bodily harm" (Pet. App. 13a).

[5]The Board noted (Pet. App. 4a) that the legal standard to be applied in assessing a claim of coerced strike participation was set forth in its decision in *Johnson* v. *Department of Transportation, FAA*, 13 M.S.P.R. 652 (1982), aff'd, 735 F.2d 510 (Fed. Cir. 1984). The MSPB

2. The court of appeals affirmed the Board's decision (Pet. App. 1a-2a).[6] It found that the pressures cited by petitioner in connection with his coercion defense "present[ed] no fact pattern which differs significantly from" previous cases in which the court had rejected the coercion defense. *Id.* at 2a, citing *Johnson* v. *Department of Transportation, FAA*, 735 F.2d 510 (Fed. Cir. 1984), *Martel* v.

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adopted—and the court of appeals approved—a "reasonable man" standard for establishing involuntary participation in a strike. The Board stated that

> [i]n order for a Federal employee charged with participation in a strike against the Government to establish a defense of coercion or duress, he must demonstrate, by a preponderance of the evidence, that his failure to report for work was the result of a *threat or other intimidating conduct, directed toward him*, sufficient to instill in him a *reasonable* fear of *physical danger* to himself or others, which a person of ordinary firmness would not be expected to resist.

13 M.S.P.R. at 660 (footnotes omitted; emphasis added). Under this standard, "menacing tones or language, fear of 'financial ruin' or jeopardy to career advancement, exuberant moral suasion, or any vexation, annoyance or pressure resulting in a state of mental perturbation, reluctance to act, or a choice of inherently unpleasant situations" do not standing alone render involuntary an individual's participation in a strike (*id.* at 658-659 (footnotes omitted)).

[6]Petitioner's petition for review in the court of appeals was among approximately 3,500 such petitions filed by discharged air traffic controllers. All but nine cases were stayed pending the court's decisions in those cases. On May 18, 1984, a five-judge panel of the court of appeals issued decisions sustaining the removals of all but one of the petitioners in the lead cases. A number of the unsuccessful petitioners filed petitions for writs of certiorari; all of those petitions were denied by this Court. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Anderson* v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497 (Fed. Cir.), cert. denied, 469 U.S. 881 (1984). The court of appeals then lifted the stay and began to consider the other pending petitions for review.

Department of Transportation, FAA, 735 F.2d 504 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984), and *Ferrando* v. *Department of Transportation, FAA*, 771 F.2d 489 (Fed. Cir. 1985).

ARGUMENT

Petitioner's basic claim is that the MSPB and the court of appeals erred by concluding that he participated in the illegal strike. The decision of the court of appeals with respect to this fact-bound issue is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

Petitioner challenges (Pet. 7-14) the standard applied by the Board and the court of appeals in assessing his coercion defense, asserting that the reasonableness of his fear of physical danger is not relevant in determining whether his participation in the strike was coerced. The court of appeals specifically rejected this argument in *Johnson* v. *Department of Transportation, FAA*, 735 F.2d 510 (Fed. Cir. 1984), defining coercion as "a threat or other intimidating conduct, directed toward [an employee], sufficient to instill in him a reasonable fear of physical danger to himself or others, which a person of ordinary firmness would not be expected to resist" (735 F.2d at 513). We discuss the reasons justifying this standard in our brief in opposition (at 10-12) in *Russell* v. *Department of Transportation, FAA*, cert. denied, No. 85-1229 (June 2, 1986). (We have supplied a copy of that brief to petitioner's counsel.)[7]

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[7]Petitioner erroneously contends (Pet. 9-10) that *Johnson* imposes upon the employee the burden of proving that he did not participate in the strike. As we discuss in our brief in opposition (at 6-7 & nn.5-6) in *Campbell* v. *Department of Transportation, FAA*, cert. denied, 469 U.S. 881 (1984), the agency need not adduce direct proof of participation where the employee has failed to rebut the agency's prima facie case of strike participation. Here, the FAA established its prima facie case by

Petitioner also challenges (Pet. 12-13) the factual finding of the Board (Pet. App. 4a-5a)—sustained by the court of appeals (*id.* at 2a)—that he was not coerced into participating in the strike. The resolution of that fact-bound question is not an issue appropriate for review by this Court.

The Board observed that no threats of physical violence were directed at petitioner and that petitioner's fear was unreasonable because "no one was physically harmed or prevented from crossing the picket line" (Pet. App. 5a). Moreover, petitioner did not contact his supervisor to explain the reasons for his absence until several days after the commencement of the strike (*id.* at 12a). Petitioner's unexplained delay weighs against his claim that his absence from his duty station was solely the result of fear of retaliation.

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showing that petitioner was away from his duty post without authorization during a strike of general knowledge. Accord *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477, 482 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984).

Petitioner also asserts (Pet. 12-13) that the *Johnson* standard precludes consideration of the facts of each particular claim of coercion. The inquiry under the reasonabieness standard, however, is whether a person could have a reasonable fear of physical danger in the circumstances confronting the employee (see note 5, *supra*). The standard therefore provides a full opportunity for consideration of the facts of each case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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